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JOHN T. ... Y, Clerk

IN THE

# Supreme Court of the United States

October Term, 1957

No. 699

SING KEE,

*Petitioner,*

v.

UNITED STATES OF AMERICA,

*Respondent.*

## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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REASONS RELIED ON FOR THE ALLOWANCE OF THE WRIT OF CERTIORARI:

POINT I.—Prejudicial error was committed by the Trial Court in permitting the Government to elicit from the witness Samuel B. Waterman testimony that he had invoked the Fifth Amendment at a grand jury hearing as to matters that he testified to at the trial herein 36

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*To the Supreme Court of the United States:*

Sing Kee, the Petitioner herein, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit entered on the 5th day of December, 1957.

### Opinion Below

The opinion of the United States Court of Appeals for the Second Circuit is reported in 248 Fed. 2d. ..... A copy of this opinion is hereto annexed and marked Exhibit "A" hereof.

## Jurisdiction

The judgment of affirmance of the United States Court of Appeals for the Second Circuit, which is sought to be reviewed herein, was made and entered on the 5th day of December, 1957.

No motion for an order requesting a rehearing was made to the United States Court of Appeals for the Second Circuit, nor was any application made for an order extending the time within which to petition for a writ of certiorari.

The jurisdiction of this Court is invoked under Rule 19 of the Supreme Court Rules and Title 28 U. S. C., Section 1254 (1), on the ground that review by the Supreme Court by writ of certiorari is sought of a judgment of affirmance on appeal by the United States Court of Appeals for the Second Circuit.

Certiorari is sought on the grounds, that the United States Court of Appeals for the Second Circuit has rendered a decision on an important question of Federal law in a way in conflict with an applicable decision of this Court; has decided an important question of Federal law which should be clarified and made more definite and certain by this Court; has rendered a decision in conflict with the decision of another Court of Appeals on the same subject; and has departed from the acceptable and usual course of judicial proceedings and has sanctioned such a departure by a lower court so as to call for an exercise of this Court's power of supervision.

## Questions Presented for Review

The Petitioner Sing Kee was convicted in the United States District Court for the Southern District of New York for conspiracy to violate the Immigration Laws, 18 U. S. C. A., Sections 371, 1425 and 1542 and 8 U. S. C. A., Section 1342 and on three substantive counts for making false statements in passport applications in violation of 18 U. S. C. A. Sections 2, 1542 and 3238.* A copy of the indictment upon which Petitioner was tried is hereto annexed and marked "Exhibit "B" hereof.

The judgment of conviction of the United States District Court for the Southern District of New York was based upon a verdict of guilty by a jury and was dated and entered the 5th day of March, 1957. Under said judgment of conviction, the Petitioner was sentenced to imprisonment for a period of two and one-half years each on counts 1, 2, 3, and 4 of the indictment, the counts upon which he was convicted, said sentences to run concurrently with each other and in addition Petitioner was fined $1500 on each of counts 1, 2, 3, 4, the total fines amounting to $6,000, to be paid, or if Petitioner stands to be committed until otherwise discharged according to law. Petitioner was continued on bail in the sum of $10,000.00 pending appeal. Petitioner is still free on said bail.

The questions presented for review with regard to the trial of the aforementioned indictment are as follows:

1. Whether the Trial Court committed prejudicial error in permitting the Government to elicit from the wit-

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* At the conclusion of Government's case the Trial Court on motion of defense counsel dismissed count 5 of the indictment, which charged the substantive crime of making false statements in passport applications in violation of 18 U. S. C. A., Sections 2, 1542 and 3238.

ness Samuel B. Waterman upon his cross examination, the fact that he had invoked the Fifth Amendment at a Grand Jury hearing as to matters that he testified to at the trial herein;

2. Whether the circumstances of the cross examination of the witness Samuel B. Waterman as to his having invoked the Fifth Amendment at a Grand Jury hearing as to matters that he testified to fully at the trial herein disregards and denies effect to this Court's views against cross examination of a witness as to his invocation of said constitutional privilege, as expressed by this Court in *Grunewald* v. *United States*, 353 U. S. 391, 1 L. Ed. 2nd 931;

3. Whether the circumstances of the cross examination of the witness Samuel B. Waterman as to his having invoked the Fifth Amendment at a Grand Jury hearing as to matters that he testified to at the trial herein, raises an identical question to that raised in *Bolich* v. *United States of America*, wherein this Court granted certiorari in 352 U. S. 866, 1 L. Ed. 2nd 74 (No. 186), as to the following question:

> "6. Whether the Trial Court committed prejudicial error in permitting the Government to elicit from the defendant Halperin upon his cross-examination, that he had invoked the Fifth Amendment at a Grand Jury hearing and that the Trial Court charged the jury that they might consider Halperin's claim of constitutional privilege as adversely affecting his credibility,"

which question was not answered by this Court when it rendered its decision, 353 U. S. 391, 1 L. Ed. 2nd 931, and which question is still a novel and open one before this Court;

4. Whether the rights of the Petitioner were violated by the Trial Court in permitting the Petitioner to be cross examined, over objection, from copies of Petitioner's Federal tax returns obtained by the Government from the Bureau of Internal Revenue, and for the possession and use of which, the Assistant United States Attorney failed to present evidence of legal authorization as required by the Federal Statutes and Federal Tax Regulations.

## Statutory Provisions in Point

Title 18, United States Code.

"§371. *Conspiracy to commit offense or to defraud United States*

If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both.

If, however, the offense, the commission of which is the object of the conspiracy, is a misdemeanor only, the punishment for such conspiracy shall not exceed the maximum punishment provided for such misdemeanor. June 25, 1946, c. 645, 62 Stat. 701."

"§2. *Principals*

(a) Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal.

(b) Whoever willfully causes an act to be done which if directly performed by him or another would

be an offense against the United States, is punishable as a principal. As amended Oct. 31, 1951, c. 655, §17b, 65 Stat. 717."

"§1542. *False statement in application and use of passport*

Whoever willfully and knowingly makes any false statement in an application for passport with intent to induce or secure the issuance of a passport under the authority of the United States, either for his own use or the use of another, contrary to the laws regulating the issuance of passports or the rules prescribed pursuant to such laws; or

Whoever willfully and knowingly uses or attempts to use, or furnishes to another for use any passport the issue of which was secured in any way by reason or any false statement—Shall be fined not more than $2,000 or imprisoned not more than five years, or both. June 25, 1948, c. 645, 62 Stat. 771."

"§3238. *Offenses not committed in any district*

The trial of all offenses begun or committed upon the high seas, or elsewhere out of the jurisdiction of any particular State or district, shall be in the district where the offender is found, or into which he is first brought. June 25, 1948, c. 645, 62 Stat. 826."

Title 26, United States Code.

"§55. *Publicity of returns*

(a) *Public record and inspection*

(1) Returns made under this chapter upon which the tax has been determined by the Commissioner shall constitute public records; but, except as here-

inafter provided in this section, they shall be open to inspection only upon order of the President and under rules and regulations prescribed by the Secretary and approved by the President.

(2) And all returns made under this chapter, subchapters A, B, D, and E of chapter 2, subchapter B of chapter 3, chapters 4, 7, 12, and 21, subchapter A of chapter 29, and chapter 30, shall constitute public records and shall be open to public examination and inspection to such extent as shall be authorized in rules and regulations promulgated by the President.

(3) Whenever a return is open to the inspection of any person a certified copy thereof shall, upon request, be furnished to such persons under rules and regulations prescribed by the Commissioner with the approval of the Secretary. The Commissioner may prescribe a reasonable fee for furnishing such copy." * * *

(f) *Penalties for disclosing information*

(1) *Federal employees and other persons.* It shall be unlawful for any collector, deputy collector, agent, clerk, or other officer or employee of the United States to divulge or to make known in any manner whatever not provided by law to any person the amount or source of income, profits, losses, expenditures, or any particular thereof, set forth or disclosed in any income return, or to permit any income return or copy thereof or any book containing any abstract or particulars thereof to be seen or examined by any person except as provided by law; and it shall be unlawful for any person to print or publish in any manner whatever not provided by

law any income return, or any part thereof or source of income, profits, losses, or expenditures appearing in any income return; and any offense against the foregoing provision shall be a misdemeanor and be punished by a fine not exceeding $1000 or by imprisonment not exceeding one year, or both, at the discretion of the court; and if the offender be an officer or employee of the United States he shall be dismissed from office or discharged from employment." * * *

FEDERAL TAX REGULATIONS (1954)

"§ 458.204. *Use of returns in litigation.*

The return of an individual, partnership, corporation, or fiduciary, or a copy thereof, may be furnished to a United States attorney for official use in proceedings before a United States grand jury or in litigation in any court, if the United States is interested in the result, or for use in preparation for such proceedings or litigation; or to an attorney of the Department of Justice, for like use, upon written request of the Attorney General, the Assistant to the Attorney General, or an Assistant Attorney General. If a return or copy is thus furnished, *it shall be limited in use to the purpose for which it is furnished* and is under no condition to be made public except to the extent that publicity necessarily results from such use. The original return will be furnished only in exceptional cases, and then only if it is made to appear that the ends of justice may otherwise be defeated. Neither the original nor a copy of a return desired for use in litigation in court will be furnished if the United States Government is not interested in the result, but this provi-

sion is not a limitation on the use of copies of returns by the persons entitled thereto." (Emphasis supplied.)

## Concise Statement of the Case

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### Glossary of Witnesses*

| | | |
|---|---|---|
| Dong Soon Chor | *Ng Mong On* | (R. 3) |
| Ng Yee Chor | *Ng Quock Keung* | (R. 131) |
| Ng Gim Ting | *Ng Yee Pon* | (R. 212) |
| Ng Jock Nuey | *Jew Sun Ai* | (R. 222) |
| Hom Ing Gim | *Jew Ing Gim* | (R. 301) |
| George Wong | *Wong Doo Hing* | (R. 406) |
| Harry Dow | *Hom Yuen* | (R. 411) |
| Chin Way Mon | | (R. 452) |
| Chin Ming Mow | | (R. 468) |
| Chin Kung Chee | *Sum Yuen Quay* | (R. 518) |
| Chin Nin Oon | *Sum Nin Goon* | (R. 547) |
| Moy Mun Sing | | (R. 563) |

* Because the various Chinese witnesses in this case are known by multiple names, i.e., birth name, marriage name and immigration name, which are not in the true sense aliases but multiple bona fide names, the name used by the United States Attorney is first set forth in this glossary and thereafter in italics along side appear the other name or names that the same witness is also known by. For the purpose of clarity, petitioner shall refer to various named witnesses under the name that the witness was first identified by the United States Attorney. It must be borne in mind, however, that throughout the testimony of this trial, the various names of each particular witness were used interchangeably throughout in the testimony of both Government and defense witnesses.

## The Government's Witnesses

Dong Soon Chon, the first witness, testified that in the year 1934, six months prior to the reported birth of Ng Quock Keung, his alleged "paper son"* in China, he reported to the U. S. Immigration officials that his wife was then pregnant (R. 108).** In the year 1936 Dong reported the birth of said "son" to the U. S. Immigration authorities. That information was not true and was reported merely to provide Dong with an opportunity to obtain official documentation of the existence of such a "son".

Dong testified that in the beginning of the year 1950, he spoke to one, Woo Lim Gee and that as a result of that conversation he met one Ng Gim Ting (R. 21); that Dong, his wife, Ng Gim Ting and Woo Lim Gee had a conversation at the Pagoda Restaurant on Mott Street in New York City concerning a suggested sale by Dong to Ng Gim Ting of the Ng Quock Keung "slot".† It was

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* The term "paper son" as hereinafter appears relates to a fictitious child or children of an American citizen allegedly born in China, whose citizenship and eligibility to enter into the United States are derivative through the American citizenship of his father. It appears to have been a wide-spread practice of many Chinese on periodic visits to the Chinese homeland where their wives resided, to report the birth of fictitious sons to the U. S. Immigration officials and thus to create official documentation of the existence in China of a son of an American citizen bearing a certain name.

** Page references preceded by the letter "R" refer to the record of proceedings filed in the United States District Court for the Southern District of New York, which record is being forwarded to this Court upon this petition for a Writ of Certiorari. Page references followed by the letter "a" refer to petitioner's Appendix on Appeal to the United States Court of Appeals for the Second Circuit, which is likewise being forwarded to this Court upon this petition.

† The term "slot" designates paper documents as to the existence of an alleged "paper son" in China. The use of the slot was often sold by a fictitious father to a person seeking to bring a relative over from China on the fictitious identity of the "paper son", whose slot was sold.

agreed that this "slot" would be sold to Ng Gim Ting for the sum of $1800 (R. 28); that Dong, his wife and Ng Gim Ting went to Petitioner's house on Mott Street and that Dong asked Petitioner to prepare the necessary papers and bring the boy over (R. 32); that Dong made three visits to Petitioner's house; that on the occasion of the second visit, Dong gave Petitioner his family history (R. 39) and on the third visit, which was several months later, Petitioner gave Dong an affidavit to sign. This affidavit and an affidavit signed by Dong's wife are among the papers which were admitted in evidence as Government's Exhibit "1", and are the affidavits and papers submitted in support of the application in the name of Ng Quock Keung for a passport (R. 45).

Dong further testified that he first saw the boy, whose photograph appears on Government's Exhibit "1" as that of Ng Quock Keung in the year 1951 when the boy was admitted to the United States; that he saw him at the time that he and his wife appeared at the Immigration office to give testimony for admission of the boy as their son (R. 62); that after the boy was admitted to the United States, the boy lived with Dong several days and then went to live in New Jersey with his uncle, Ng Gim Ting (R. 65). Government's Exhibit "2" in evidence (R. 83) and Government's Exhibit "3" in evidence (R. 87) are various documents which Dong testified that he signed in the Petitioner's office, after the boy was admitted and were prepared in support of an application to obtain a certificate of citizenship for the boy. It was further brought out on examination of Dong, that Dong received and kept the $1800 that he was paid by Ng Gim Ting for sale of the "slot" (R. 127).

Ng Yee Chor was the second witness on behalf of the Government. This witness was the boy brought to the

United States on the Ng Quock Keung "slot". Ng Yee Chor testified that he was born in China (R. 131); that he knows Ng Gim Ting whom he once saw in China (R. 132); that while Ng Yee Chor lived in Hong Kong prior to coming to the United States, he was supported by Ng Gim Ting (R. 135) and while in Hong Kong he received family coaching papers mailed to him by Ng Gim Ting. This witness stated that during the month of March, 1951, he came to the United States under the name of Ng Quock Keung (R. 133) and that after coming to the United States he lived with Dong and his wife for a few days and then went to New Jersey to live with his uncle.

Ng Gim Ting testified that he returned to the United States from a visit to China in the year 1947 (R. 146) and that about the beginning of the year 1950 he had a conversation with a Mr. Woo at the Chinese Community School in China Town, in New York City concerning Ng Yee Chor (R. 147), a boy that he had heard of when he was in China (R. 143). In this conversation Mr. Woo stated that he knew somebody who had a "slot" for sale (R. 149), and that Woo would put that person in contact with Ng Gim Ting (R. 155). On a Sunday Ng Gim Ting met Dong, Dong's wife and Mr. Woo at the Chinese Community School where Woo introduced the witness to the other parties (R. 158). Dong, at that time, told Ng Gim Ting that he had a "slot" for sale for $1800. Ng Gim Ting testified that he agreed to buy the slot for this price and he, Dong, and Dong's wife then went to the Petitioner's office to have the necessary papers prepared to bring the boy over; the witness testified that the Petitioner told him that his charge would be $400 for preparing the papers and that he paid this sum on his third visit (R. 169, 174). The witness, on being shown Government's Exhibit "1" in evidence identified the photograph of the

boy represented thereon as being Ng Quock Keung as being in reality that of Ng Yee Chor, a cousin of the witness. In addition to paying Dong $1800 for the "slot", Ng Gim Ting paid for the boy's plane fare to the United States, which fare cost $900 (R. 175, 269) and sent $200 to the boy for his support in Hong Kong where the boy lived at the time (R. 289).

Ng Gim Ting also testified as to the second boy whom he attempted to bring to the United States, one Ng Jock Nuey. He stated that while on his visit to Toishan City in China in the year 1947, the parents of Ng Jock Nuey spoke to him about the boy (R. 178); that the boy, Ng Jock Nuey, was a cousin of his; that after his return to the United States and some time in either November or December 1949, Ng Gim Ting spoke to one Hom Gim, an old acquaintance, about his buying a "slot" from the said Hom Gim (R. 182); that Hom Gim had for sale a "slot" under the name of Jew Sun Ai, which paper the witness desired to purchase in order to bring his cousin Ng Jock Nuey to the United States. The price for the Jew Sun Ai slot was $1000 and Ng Gim Ting agreed to pay this sum. Two days later after that conversation, Ng Gim Ting, together with Hom Gim, when to Petitioner's place of business and requested Petitioner to prepare the necessary papers to bring the boys to the United States; that the Petitioner charged for his services in preparing these papers the sum of $200 (R. 183); that Ng Gim Ting paid Petitioner $400 on his third visit to Petitioner's place of business (R. 194).

Government's Exhibit "4" in evidence contains affidavits and papers submitted in support of the application under the name of Jew Sun Ai for a passport (R. 185). The witness on his third visit to Petitioner's office was given the papers identified as being part of Government's

Exhibit "4". At the same time the witness was given a family coaching book. This family coaching book (R. 187), was later admitted in evidence as Government's Exhibit 5 (R. 266). The witness further testified that he sent Government's Exhibit "5", the coaching book, to Hong Kong to Ng Jock Nuey and that he had likewise mailed to Ng Jock Nuey Government's Exhibit "4" (R. 193); that all of the papers mailed by this witness to Ng Jock Nuey and Ng Yee Chor in Hong Kong were mailed to the Sing Wo Tong store owned by one Ng Sim Yee (R. 193, 199, 235), who apparently was this witness' contact in Hong Kong. The witness further testified that he sent $200 apiece to Hong Kong to pay for the expenses of Ng Jock Nuey and Ng Yee Chor while they were in Hong Kong (R. 219). However, Ng Jock Nuey was never admitted to the United States and the witness never paid Hom Gim the agreed sum of $1000 in view of the fact that the boy was never brought over (R. 254). When Ng Jock Nuey's application for admission to the United States was denied, the witness instructed the Petitioner to take steps to appeal the matter (R. 200). Government's Exhibit "6" in evidence, is the original of a civil complaint brought by Hom Ing Gim under the name of Jew Ing Gim against the Secretary of State to have the boy Ng Jock Nuey under the name of Jew Sun Ai declared a citizen (R. 201).

Hom Ing Gim testified that he originally was admitted to the United States in the year 1923 and that he returned to China in 1930 at which time he married and that he reported to the United States Immigration authorities that he had three children whereas in truth and fact, he only had two children (R. 302). The non-existent "paper son" reported by this witness was under the name of Jew Sun Ai. This witness testified that he had known the preceding witness Ng Gim Ting, having traveled on the same boat to China with him in 1947 (R. 304) and that he had

also worked for him in the United States (R. 305). Hom Ing Gim further testified that he had a conversation with Ng Gim Ting in the year 1949 wherein he agreed to sell the Jew Sun Ai "slot" to Ng Gim Ting for the sum of $1000 (R. 306, 307). He and Ng Gim Ting went to the Petitioner's place of business several days later and he gave family coaching books to a Chinese man in Petitioner's office, whom the witness described as the Petitioner's partner; that the second time that he went to the Petitioner's office, which was two weeks after the first visit, he signed certain affidavits, which papers appear in Government's Exhibit "4" in evidence (R. 312), and that on the third visit to the Petitioner's office, some two or three months after the second visit, he received two sets of the coaching books, which he previously gave to Petitioner's "partner". This witness further testified that Government's Exhibit "5" in evidence was one of the coaching books that he received at Petitioner's office on his third visit there (R. 317). He visited the Petitioner's office a fourth time, two weeks after the previous visit, at which time they discussed the Jew Sun Ai application and the fact that it was denied (R. 318). Hom Ing Gim further testified that he had heard originally of the denial from Ng Gim Ting (R. 350) and that he then went to the Petitioner. The witness identified Government's Exhibit "6" in evidence as a paper signed by him at a lawyer's office on Broadway in a proceeding brought to have the boy attempting to come in under the Jew Sun Ai "slot" declared an American citizen (R. 319).

George Wong testified that he was married in China and was smuggled into the United States via the Canadian border in the year 1936 (R. 407); that he discussed bringing his son to America with a friend, one Chin Way Mon, prior to Chin Way Mon's visit to China in 1948. In this conversation, which took place before the commencement

of the conspiracy charged in the indictment, and which was admitted over objection and subject to connection (R. 410), Chin Way Mon told the witness that he had a "slot" suitable for the witness's son. This "slot" was in the name of Chin Seu Loon (R. 411). Wong testified that the legal papers for the admission of his son to the United States under the name of Chin Seu Loon were prepared at the office of Harry Dow, an attorney, in 1948 (R. 411). The papers submitted in support of the passport application of Wong's son in the name of Chin Seu Loon were admitted in evidence as Government's Exhibit "9" (R. 416-417). The witness further testified that he was to pay Chin Way Mon compensation for the Chin Seu Loon "slot" after the boy was admitted to the United States (R. 435) and that the $500 that he gave Chin Way Mon before Chin Way Mon went to China were for transportation and expenses to bring the boy over (R. 434); that in all he gave Chin Way Mon approximately $1,000 (R. 416, 417, 434) which was merely to cover expenses and not for the "slot" that had been sold. Wong further testified that his son never was admitted to the United States and that Wong met the Petitioner for the first time in the summer of 1952 (R. 438) after Wong had been informed that his son's application had been denied (R. 420-421); that at that time he asked the Petitioner if the Petitioner could help to have his son admitted to the United States notwithstanding the fact that the pastport application had been denied; that the Petitioner told him that a Court action would be necessary and recommended the services of the attorney Waterman (R. 424); that he told the Petitioner that he was trying to bring his son into the United States under the name of Chin Seu Loon and that Chin Way Mon's oldest son would sign the Court papers necessary to commence the action (R. 428). Government's Exhibit "10" in evidence consists of the complaint in the ac-

tion entitled, "Chin Way Mon as father and next-of-kin of Chin Seu Loon, against the Secretary of State, for declaration of the son's citizenship" (R. 431). Wong further testified that he never personally paid the lawyer any money (R. 431), but that when Chin Way Mon returned from China in April 1954, Wong gave Chin Way Mon $250 to pay the lawyer and $30 to pay Court costs (R. 432).

CHIN WAY MON testified that he was born in China (R. 452); that he was married in China and came to the United States in 1922; that he returned to China three times and that by his first wife, now deceased, he had three sons (R. 453); that one of these sons was named Chin Seu Loon, who was killed in the China-Japanese War (R. 454); that although he reported the births of his sons to the U. S. Immigration Service, he never reported to it the death of his son Chin Seu Loon (R. 458); that he knew one George Wong (R. 455-456) and that he spoke to Wong about Wong's son to whom he referred to as his Chin Way Mon's god-son (R. 457); that George Wong wanted to bring his son to the United States (R. 457) and that he, Chin Way Mon, agreed to help bring the boy in on the "slot" of his deceased son Chin Seu Loon, it being understood that whatever expenses accrued in bringing the boy over, George Wong was to pay (R. 460). Chin Way Mon identified the photograph on Government's Exhibit "9" in evidence represented in said exhibit as a photograph of Chin Seu Loon, as really being that of Wong Wing, the son of George Wong (R. 461). The witness further testified that this photograph had been sent to him originally from China by Wong Wing (R. 462). Chin Way Mon further testified that when he visited Hong Kong in 1948, George Wong gave him $500 and that upon his return from China, he borrowed more money from Wong (R. 465). Although the witness denied ever having heard the name of

the attorney Samuel B. Waterman (R. 465), he stated that he visited Waterman's office one time in 1955, because Waterman had sent a letter to him, in care of his son. The boy Wong Wing was never admitted to the United States (R. 466).

CHIN MING MOW, another Government witness, testified that he was born in Toishan, China, in 1918; that he first came to the United States in 1929 (R. 468), and that he was married in China in the year 1934 (R. 469); that he had a son named Chin Sung Hong who was born in China in the year 1936 and that he reported the birth of this son to the Immigration authorities (R. 470); that his son died in the year 1937 during the China-Japanese War, but that he did not know of his son's death till sometime in the 1950s; that he first went to appellant's house sometime during the year 1951 (R. 472) and that he wanted the Petitioner to prepare papers to have his son brought into the United States and which the Petitioner agreed to do (R. 473); that he signed some legal papers at the Petitioner's office (R. 474). Government's Exhibit "13" in evidence is the passport application in the name of Chin Sung Hong, the son of Chin Ming Mow. This witness testified that in the year 1952, the boy whom he believed to be his son Chin Sung Hong, arrived in the United States by plane from Hong Kong (R. 480); that after the boy whom he believed to be his son arrived at Ellis Island he, Chin Ming Mow, was requested by the Immigration Service to take blood tests so that his blood would be checked against the blood of his purported son (R. 482, 487). After the blood tests were taken the witness was informed that his blood and the alleged son's blood were not compatible (R. 484); that he discussed this fact with the Petitioner who stated that he would see what he could do to help the case (R. 485). Chin Ming Mow further testified that Peti-

tioner referred him to attorney Waterman and that Chin Ming Mow went to the attorney's office and signed some papers there (R. 489); that he believed that the boy brought over to the United States on the Chin Sung Hong application was his true son up until the time that the blood tests proved incompatible (R. 469), and that he only learned that the boy was not his real son after he informed his wife in China of the blood test results (R. 500).

CHIN KUNG CHEE, a Government witness, testified that he was born in China of Chinese parents who had never been in the United States but that he came to the United States in the year 1930 under the name of Sum Yuen Quay as the "paper son" of one Sum Wung Loy, an American citizen (R. 518); that he was married in China before he came to the United States and that he and his wife had two sons and one girl (R. 519); that he desired to bring his son Chin Nin Oon to the United States in the year 1952, and that he told the Petitioner to prepare the necessary papers for him (R. 520, 521). This witness further testified that on his third visit to the Petitioner's office, he told the Petitioner that the identification of his son was not right and that the Consul in Hong Kong reported that the boy was a member of the Chin clan (R. 528-529); that the Petitioner when thus informed stated that there was nothing he could do about it. Chin Kung Chee further testified that he had signed the affidavits contained in Government's Exhibit "8" in evidence at the Petitioner's office in the presence only of the Petitioner (R. 529) and that he paid the Petitioner $200 for preparing these papers and agreed to pay another $300 after the boy was admitted to the United States (R. 531). The boy was never admitted to the United States (R. 557). Government's Exhibit "14" in evidence is a civil complaint in the name of Sum Yuen

Quay, as father and next-of-kin of Sum Xin Oon against the Secretary of State to declare the boy a citizen (R. 538). The witness testified that he signed Exhibit "14" in an attorney's office, but he denied retaining the attorney Waterman, whose name appears as the plaintiff's attorney on said Exhibit (R. 436). Government's Exhibit "15" in evidence was a letter addressed by this witness to the attorney Waterman with a notation dated November 27, 1955, instructing the attorney to discontinue the case (R. 538).

Moy Mux Sing, a Government witness, testified through an interpreter, that he was born in Hoboken, New Jersey, in the year 1894 and that he made three trips to China (R. 563); that he was married in China in the year 1919 and that he and his wife have four children, three boys and one girl (R. 564). The witness reported the birth of all of these children to the U. S. Immigration office. However, the girl whose name was Moy Fung Mee (R. 564) was reported as a boy named Moy Hing Mee (R. 565); that his two oldest sons are presently in the United States but that his third son, Moy Hing Tung is presently in Hong Kong while the daughter resides in China (R. 565); that he tried to bring the third boy Moy Hing Tung into the United States in 1952 and that he went to Petitioner's office to have the necessary legal papers prepared at that time (R. 566); that the first time that he visited Petitioner's office he met a Chinese man who he called the Petitioner's assistant, who introduced the witness Moy Mun Sing to the Petitioner (R. 569). At the time of his second visit to Petitioner's office, the Petitioner told him that he knew a person who was willing to pay $1500 to the witness for the Moy Hing Mee "slot" that the money was to be paid only after a boy whom the unidentified person wished to bring over to the United States under the name of Moy Hing Mee had been admitted to the United States (R. 570);

that Moy Mun Sing paid Petitioner $50 for preparing legal papers for the admission of his third son, Moy Hing Tung, and that he was to pay the Petitioner $450 more after his third son was admitted to the United States (R. 571). Regarding the Moy Hing Mee slot, the witness testified that he never was paid the $1500 discussed (R. 572). The witness, Moy Mun Sing, further testified that he signed affidavits contained in Government's Exhibit "7" (Moy Hing Mee and Moy Hing Tung passport applications) in the Petitioner's office when the man he described as the Petitioner's assistant was present (R. 573); that he does not remember whether the Petitioner himself, any white man, or any Notary Public was present at the time. Government's Exhibit "16" in evidence (R. 578-579) is a complaint in a civil action brought by Moy Mun Sing as father and next-of-kin of Moy Hing Mee against the Secretary of State to have the boy declared a citizen. This witness further testified that neither his third son Moy Hing Tung nor the boy using the Moy Hing Mee "slot" ever came to the United States (R. 577); that he did not know personally the attorney Samuel B. Waterman whose name appears on Exhibit "16" as the attorney for the plaintiff (R. 578) but that he signed said Exhibit at the attorney's office where he was accompanied by the man he described as Petitioner's assistant (R. 577, 580). This witness further testified that he did not tell the Petitioner about the fact that he had a daughter in China reported by him to the United States Immigration Service as his son Moy Hing Mee and the fact that the son Moy Hing Mee was reported by him in place of the girl was not told to the Petitioner at the time the Moy Hing Mee travel papers were drawn up (R. 588). The first time this witness told anybody about the existence of the girl was when he appeared before the Grand Jury (R. 587).

## The Attorneys—Witnesses for the Government

CHARLES E. BOOTH testified that he is an attorney admitted to practice in Washington, D. C., and that he has been practicing law in Washington, D. C., since 1923 when he resigned from the United States Immigration Office where he held the position as Chief Chinese Inspector (R. 353); that he knew the Petitioner for many years and that the Petitioner referred cases to him involving Chinese who wished to bring relatives over to the United States; that he forwarded to the American Consul in Hong Kong affidavits on behalf of the clients and that if any trouble developed in connection with such cases, he would follow the matters up with the State Department in Washington, D. C. (R. 355); that for forwarding affidavits to Hong Kong he was usually paid a fee of from $25 to $30 for each application forwarded and that the money was usually forwarded to him by the Petitioner by checks drawn on the China Overseas Agency at 11 Mott Street (R. 359); Booth further testified that he forwarded Government's Exhibit "7" (passport application submitted on behalf of Moy Hing Mee) and Government's Exhibit "8" (passport application submitted on behalf of Sum Nin Oon) to Hong Kong (R. 361); that in addition to the usual fee of $25 to $30 for forwarding affidavits, his arrangement was that when the applicant was admitted to the United States he was to be paid an additional fee of $75 (R. 377) and that in those cases when he had to appear before the State Department in support of one of the passport applications, he would have an independent fee set up based upon service required to be rendered in such proceedings (R. 378).

HARRY HOM DOW, another attorney, also appeared as a Government witness. Dow testified that he was admitted to practice law during the year 1929 (R. 379); that in

about 1948 or 1949, he did legal work for the Petitioner in that he handled cases referred by the Petitioner involving immigration and naturalization matters, prepared affidavits and appeared before the Immigration and Naturalization Service in New York in regard to these cases (R. 380); that in the handling of these immigration cases, when the Petitioner would recommend a client, the client would sometimes come up in person to his office, in which case Dow would obtain the information first hand and that sometimes Petitioner would obtain the information himself from the client and either forward the information to Dow's office or have an affidavit prepared in his own office which would be then sent to Dow to be checked (R. 382); that Dow was paid approximately $25 for each affidavit that he worked on (R. 384) and that in cases where he had to appear before the Naturalization Service, he charged an additional fee of $75 to $100 (R. 393); that between the years 1950 and 1952 he handled approximately between 75 and 100 cases that were referred by the Petitioner (R. 381); that he prepared the affidavits in the name of Ng Mong On and Woo Lun Ying contained in Government's Exhibit "1" (R. 384), the affidavit prepared in the name of Jew Ing Gim contained in Government's Exhibit "4" (R. 385), the affidavit prepared in the name of Moy Mun Sing contained in Government's Exhibit "7" and the affidavit prepared in the name of Sum Yuen Quay contained in Government's Exhibit "8" (R. 388); that usually five copies of the various affidavits would be prepared and executed (R. 389); that the clients that he knew as Ng Mong On, Sum Yuen Quay, Moy Mun Sing, and Jew Ing Gim were referred to him by the Petitioner (R. 394); that usually the Petitioner would pay him directly for the services rendered.

## The Defense Witnesses

Samuel B. Waterman, appeared as a witness for the defense. The testimony of this witness and the matters brought out on his examination constitute matters of great import on this appeal. Waterman testified that he is an attorney and counselor at law, admitted to the New York State Bar for over 25 years and admitted to practice in the District Court for the Southern District for over 20 years (R. 590); that he knows the Petitioner since the year 1935 or 1936 (R. 591). Waterman directly contradicted the testimony of the Government witnesses Hom Ing Gim, Chin Way Mon, Chin Kung Chee and Moy Mun Sing. Waterman on being shown Government's Exhibit "6" in evidence (passport application in the name of Jew Sun Ai) stated that he remembered the matter; that it was a case that he had handled (R. 592). Waterman refreshing his recollection from his office files stated that on or about December 19, 1952, a person who he was told was named Jew Ing Gim came to his, Waterman's, office together with a translator from the Petitioner's office, either a Mr. Albert Kee or one Wilbur Chung (R. 594); that the person known to him as Jew Ing Gim, through the translator, informed him that the American Consul in Hong Kong had refused to issue travel papers to his son (R. 596); that from the information give him by the person known to him as Jew Ing Gim plus information obtained from affidavits that Jew Ing Gim brought, Waterman prepared a civil complaint in the name of Jew Ing Gim as father and next-of-kin of Jew Sun Ai against the Secretary of State to have the boy declared a citizen. This complaint is marked Government's Exhibit "6" in evidence. The complaint was verified by the person known to Waterman as Jew Ing Gim before a Notary Public (R. 597) and was filed shortly thereafter with the Clerk of the United States District

Court for the Southern District of New York (R. 600); that the person he knew as Jew Ing Gim, through the appellant, paid Waterman $150 for legal services rendered in the civil case (R. 602); that the civil action in the name of Jew Ing Gim was discontinued, on November 9, 1955, pursuant to instructions from said person (R. 600).

Regarding the civil action instituted in the name of Jew Ing Gim on behalf of his claimed son to have the boy declared a citizen, this action was referred to by Waterman as an action brought under Section 903 of the Nationality Act also known as Section 503 of the United States Code of Immigration Law. Waterman testified that in his opinion, the right to bring an action under that law expired on or about December 24, 1952 (R. 603). Waterman on cross-examination, explained that the flurry of civil cases brought under the aforementioned statute during the latter part of 1952 was caused by the fact that Chinese newspapers in New York City in the latter part of 1952 informed their readers that the rights under the law granting reviews by the District Court from the determination of the Immigration Department would expire in late December of that year (R. 655).

Waterman was shown Plaintiff's Exhibit "10" in evidence, the civil complaint in the name of Chin Way Mon as father and next-of-kin of Chin Seu Loon to have the boy declared an American citizen. He stated that he had handled that case (R. 605); that on or about December 15, 1952, a person introduced to him as Chin Wah Loon came to his office. Waterman, incidentally, testified that that case was not recommended by the Petitioner (R. 655); that the person he knew as Chin Wah Loon told him that he, Chin Wah Loon, had a brother in Hong Kong whose application to enter the United States had been denied. Waterman testified that the person he knew as Chin Wah Loon stated that his father, Chin Way Mon, was then in

Hong Kong and that the father wanted to institute a civil action in the Court to have his son, Chin Sou Loon, admitted to the United States. (R. 606); that Chin Wah Loon gave him the necessary information for preparation of a complaint, which Waterman prepared and which is Government's Exhibit "19" in evidence; that he signed same as the attorney and filed it with the United States District Court for the Southern District of New York (R. 607). This complaint was not verified by the plaintiff Chin Way Mon for the reason that Chin Way Mon was out of the country (R. 607). Waterman testified that when the civil case brought in the name of Chin Way Mon appeared on the Court calendar in 1955 he wrote first to Chin Way Mon and when Chin Way Mon's letter was returned unopened and undelivered, he wrote to Chin Wah Loon. On or about November 29, 1955, a person introduced to Waterman as Chin Way Mon and his son the person known as Chin Wah Loon came to Waterman's office (R. 612); that Waterman was paid $275 by the person he knew as Chin Way Mon and was instructed to discontinue the action (R. 616); that the action was discontinued on May 9, 1956.

Waterman was shown Exhibit "14" in evidence, the civil complaint in the name of Sum Yuen Quay as father and next of kin of Sum Nin Ong against the Secretary of State to have the boy declared a citizen (R. 619). The witness testified that he had handled this case also from his recollection, as refreshed from his file, he testified that on or about December 22, 1953, a person introduced to him as Sum Yuen Quay came to his office accompanied by either Albert Kee or Wilbur Chang, the persons referred to hereinafter, who acted as interpreter (R. 620). Waterman further testified that the person he knew as Sum Yuen Quay stated that the application of his son for admittance to the United States was denied by the Immigration Department and that he wished to bring a civil action to have

the boy brought over. Sum Yuen Quay had with him a copy of the travel affidavit of his son and Waterman prepared the complaint from the information and documents given him by said person and contained in the said affidavit. The complaint, which is Government's Exhibit "14" in evidence, was verified by Sum Yuen Quay approximately two days before Section 503 of the Immigration Act expired (R. 626). Waterman stated that he never saw the person he knew as Sum Yuen Quay after that date and that he was never paid for the services rendered in this civil action; that he had sent a letter to the Petitioner on which he requested an authorization to withdraw from the case and that he received later a copy of said letter with Sum Yuen Quay's signature thereon authorizing him to do so (R. 627).

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Waterman was shown Government's Exhibit "16" in evidence, the complaint in the name of Moy Mun Sing as father and next-of-kin of Moy Hing Mee against the Secretary of State seeking a Court order to declare the boy a citizen. Waterman testified that he had handled that case. He stated from his recollection, as refreshed by his files, that a person introduced to him as Moy Mun Sing came to his, Waterman's, office with either Albert Kee or Wilbur Chung; that Moy Mun Sing stated that his son in Hong Kong was denied permission to come to the United States and that he wanted to institute a civil action for the boy's admission (R. 630). Moy Mun Sing brought a copy of an affidavit with him and from this paper plus the information given him by said person, Waterman prepared a civil complaint, Government's Exhibit "16" in evidence, which complaint was verified by Moy Mun Sing. Waterman further testified that Moy Mun Sing visited his office again with an interpreter on or about November 22, 1955. At that time the witness, Waterman, stated, after his urged claim of client-attorney privilege was denied by the Court, that

he discussed the pending civil case with Moy Mun Sing and that the client told Waterman that he had a son in the United States, one Moy Hing Fung who would be a witness in the civil case. Waterman then discussed the fee with his client and told him that unless he was paid, he, Waterman, would either withdraw from the case or the case would be dismissed (R. 633). Waterman stated that he was never paid a fee in this case and that in March, 1956, he wrote Moy Mun Sing, that unless he was paid, he would do nothing more in the case. This letter was never answered and Waterman assumed that the case was marked off the calendar (R. 634).

The United States Attorney after having cross-examined Waterman extensively on the type and number of immigration cases that Waterman had handled (R. 649, *et seq.*) and the results of the legal actions brought by Waterman, proceeded to cross-examine Waterman as to what he did with the fees that he collected in the immigration cases and whether he kept any records concerning the cases and these fee payments. In answer to the questions, Waterman testified that he deposited the fees received in his checking account which he maintained in the Trust Company of North America at 115 Broadway (R. 692, 15a). Apparently for dramatic effect the United States Attorney requested this answer to be repeated. The next question was, did Waterman keep any records concerning these payments. Waterman's answer was that he did keep records, to wit: his checking account and the case file itself (R. 693, 16a). *Waterman was then asked if he believed that the answers that he had given would incriminate him.* This question was objected to and the objection was sustained (R. 693, 16a). The United States Attorney then approached the side bar and brought to the attention of the Judge, in the absence of the jury, that on being asked these questions

before the Grand Jury, Waterman had claimed his privilege under the Fifth Amendment and refused to answer the aforementioned questions on the ground that they might tend to incriminate him (R. 694, *et seq.*, 16a, *et seq.*). The United States Attorney then stated that he proposed to show the invocation of the Fifth Amendment by Waterman as a prior contradictory statement (R. 695, 17a). The defendant's attorney objected vehemently to the introduction of such proof urging that to receive such proof would be highly prejudicial, a fact admitted by the U. S. Attorney, who stated that "I know it is prejudicial and it shows the man's testimony is false." Defendant's attorney then informed the Court that if the Court would permit this proof, the defendant would ask for the withdrawal of a Juror (17a). After the Trial Court indicated that he would overrule any objection to such proposed proof, the discussion before the side bar was discontinued and in the presence of the jury the witness Waterman was read the various questions and answers that he had given before the Grand Jury with respect to questions and answers as to where he deposited the fees received in the immigration cases and what sort of books and records he kept and he was further asked whether he had claimed his rights under the Fifth Amendment before the Grand Jury in answer to said questions (R. 699, 20a). At this point the attorney for the Petitioner whose objection was overruled by the Court moved for the withdrawal of a juror, which motion was denied (R. 700, 21a). Waterman, in reply to these questions stated that he did not recollect the questions and answers given before the Grand Jury wherein he claimed his privilege under the Fifth Amendment before the Grand Jury but that if those statements are from the minutes (R. 702, 23a) the questions propounded to him before the Grand Jury and the answers to these questions as read by the prosecutor from the Grand Jury minutes were no doubt so asked and so answered.

## The Petitioner-Defendant's Testimony

SING KEE, the Petitioner herein and the defendant below, took the stand and testified in his own defense. Petitioner Sing Kee, American born, 61 years of age, married and having five children (R. 706) has an exemplary war record for his services in World War I (R. 710-713). Petitioner testified that on his discharge from the Army in 1919, he joined the U. S. Immigration Service with which he served from 1919 until 1928 (R. 714); that at the time of the trial and previous thereto he conducted the business of the China Overseas Travel Service at 11 Mott Street, New York City; that most of his clients are of Chinese origin and do not speak English and that part of his services consisted of assisting his clients in filling out and preparing passport and visa applications for travel abroad (R. 715); that he also processes people coming over from Hong Kong (R. 716) and that he prepares necessary travel documents for his clients and in general tries to facilitate the travel arrangements made for or by his clients (R. 717).

Petitioner testified that Government's witness Dong Soon Chor was known to him under the name of Ng Mong On and that he met this individual for the first time, when Dong, together with his wife, came to the appellant's office and asked the Petitioner to draw up necessary papers for them to bring their son to the United States; that at that time, Dong gave Petitioner his Certificate of Identity, travel documents and a two or three page letter containing the family history of the witness Dong under the name of Ng Mon On, the name under which said witness was known to the Petitioner at the time (R. 719); that a first set of affidavits were prepared to be submitted in support of the application for a passport of the son of Dong. This set of papers was marked in evidence as Defendant's Ex-

hibit "C" (R. 728-729). Petitioner further testified that these papers were prepared in the office of the attorney Harry Dow and that Dong took the papers home to check them over (R. 724); that Dong brought Exhibit "C" back to Petitioner's office and told Petitioner that certain corrections should be made in the papers. A new set of papers was typed up with the corrections. These papers are the affidavits contained in Government's Exhibit "1" in evidence (R. 726).

Petitioner further testified that after the corrected affidavits were signed, Dong was given one or two copies and attorney Harry Dow was given either one or two other copies. Dow was to send a copy of these affidavits to the Consul in Hong Kong and Dong was to send a copy to his son in Hong Kong. At the time of the delivery of the affidavits to Dong, the Petitioner asked for and collected $100 from Dong (R. 734). Out of this sum the attorney Dow was paid approximately $30 and Petitioner kept about $45 or $50 (R. 736) for his services.

The next time the Petitioner saw Dong was when Dong called at the Petitioner's house and stated that he wanted his son's case taken up with the State Department and that he wished it to be expedited (R. 738) as Dong's son was approaching the age of 16, which age Dong believed was the top age for bringing sons of American citizens from China under the law (R. 738). Petitioner testified that he told Dong that if Dong's son's case was to be taken up with the State Department, Mr. Booth, a Washington attorney who specialized before the State Department, would want a retainer of between $75 and $100 and that Dong agreed to pay the same (R. 738). The case was subsequently referred to the attorney Booth in Washington.

Petitioner further testified that the next time he saw Dong was in the early summer of 1950 when Dong told

Petitioner that his son's application was going to be approved and Dong wanted to purchase from the Petitioner's office a ticket to bring the boy over; that Dong stated he did not have the money on him but that he would have it sent up; that later Ng Gim Ting brought the money over stating that this was the money for Ng Mong On's (Dong's) son (R. 742). The Petitioner further testified that he did not see Dong again until the son, Ng Quock Keung, arrived in the United States (R. 743); that after the boy arrived Petitioner was told by Dong that the boy was being detained on Ellis Island and that Dong wanted the Petitioner to engage counsel for him; that Petitioner suggested the name of Harry Dow (R. 744). The boy subsequently was admitted to the United States and after his admission, Petitioner was paid $300 more. Of this sum Petitioner paid $100 to Harry Dow for his legal services, $75 to Booth for his legal services, and Petitioner kept the balance (R. 745).

The Petitioner testified that he subsequently saw Dong in 1945 at the offices of the On Leong Association, when, for the first time he learned that the family name of the man he previously knew as Ng Mong On was Dong Soon Chor (R. 746). Petitioner testified that Dong later told him that he had received a letter from the State Department concerning the admission of his son and that Petitioner recommended Dong to the attorney Waterman. Petitioner testified that the first time that he had learned that the boy Ng Quock Keung was not the real son of Dong was after he, the Petitioner, was indicted (R. 750) and that he had never heard or was ever told of Dong selling a "slot" in the name of Ng Quock Keung to Ng Gim Ting (R. 749).

Petitioner further testified that Government witness, Hom Ing Gim, known to the Petitioner under the name of Jew Ing Gim was introduced to him by Ng Gim Ting in

the year 1949 (R. 759); that Ng Gim Ting told the Petitioner that Hom Ing Gim was the cook in Ng Gim Ting's restaurant and that Hom Ing Gim wanted to bring his boy Jew Sun Ai to the United States from Hong Kong (R. 760); that Hom Ing Gim requested Petitioner to prepare papers for this purpose and that Hom Ing Gim gave the Petitioner his Certificate of Identity and two photographs to be used with the papers; that around December, 1952, Petitioner was notified by Hom Gim that the passport application of Jew Sun Ai, was denied (R. 772); and that Petitioner recommended the father Hom Ing Gim to the attorney Waterman for further appeal (R. 773).

Petitioner further testified that he never met Chin Way Mon, but that he met Chin Wah Loon in the latter part of December 1952 and that Chin Wah Loon claimed to be the oldest son of Chin Way Mon (R. 785); that he was told by a third party that Chin Wah Loon was a brother of a father who wanted to start a Section 503 action to have his son admitted from Hong Kong as the son of an American citizen (R. 787); that he sent Chin Wah Loon to the attorney Waterman and that that was the last that he had anything to do with the matter (R. 788).

Petitioner further testified that he knew Government's witness Chin Kung Chee under the name of Sum Yuen Quay (R. 788) and that Chin Kung Chee came to his office in the summer of 1952 to have papers prepared to bring his son, Sum Nin Oon to the United States (R. 790). The affidavits submitted in support of the application to admit the boy using the name Sum Nin Oon to the United States are Government's Exhibit "8".

Petitioner further testified that he collected $100 from Chin Kung Chee for preparing these papers and that out of his money, he paid attorney Dow $25 or $30 and that he paid a man named Crean $2 per hour for the typing

work done in that mater. The balance of $45 or $50 he retained for his own services (R. 792); that Chin Kung Chee at the time he appeared at Petitioner's office brought travel affidavits and photographs; that he stated to Petitioner that the photographs were of him and of his son; that h saw Chin Kung Chee two more times and that he had the travel affidavits prepared and sent to Hong Kong on behalf of Chin Kung Chee either by the attorney Harry Dow or the attorney Booth (R. 793); that late in 1953, Chin Kung Chee, whom he knew as Sum Yuen Quay, told the Petitioner that the people in Hong Kong found out that he was a member of the Chin and not the Sum family; that he at that time asked Chin Kung Chee whether he was a Chin and when he was informed that he was a Chin, Petitioner stated to him that he could do nothing further for him and that he, the Petitioner, would have to abandon the case (R. 796); that the time that he learned that Government witness Chin Kung Chee was a member of the Chin family was after he had recommended this client to the attorney Waterman and after a civil action had been instituted (R. 796-797); that neither he nor Waterman were ever paid anything in connection with the civil action.

Petitioner further testified that he met Government witness Moy Mun Sing in May of 1952 at which time Moy Mun Sing told the Petitioner that he had two sons in China whom he wished to bring to the United States (R. 798); that Moy Mun Sing at the time gave the Petitioner his Certificate of Identity and other information required in order for the Petitioner to have the necessary passport affidavits prepared; that he prepared two sets of passport affidavits. One set was for the son Moy Hing Tung and the other set was for another son Moy Hing Mee (R. 799). The photographs annexed to Government's Exhibit "7" was given to him by Moy Mun Sing who at the

time told him that the photograph was a picture of his Moy Mun Sing's son; that he received $50 for each set of papers or for both sets the total of $100 out of which he paid attorney Booth $50 (R. 802); that Moy Mun Sing came to his office several months after the papers were sent out and that on the second visit, which was in about December, 1952, Moy Mun Sing told the Petitioner that he wanted to file Section 503 suits, as the deadline to bring such suits was fast approaching; that he referred Moy Mun Sing to the attorney Waterman (R. 807). Petitioner categorically denied ever having had a conversation with anybody concerning the sale of the Moy Hing Mee "slot" for $1500 (R. 808).

On cross-examination of the Petitioner, the Assistant U. S. Attorney, after questioning the Petitioner regarding income received from his business for various years, questioned the Petitioner from the Petitioner's income tax returns filed for the years 1951 (R. 866, 26a) and 1952 (R. 875, 33a). These income tax returns were marked Exhibits "17" and "18" for identification, respectively. The attorney for the Petitioner raised timely objection to references to use of the aforementioned income taxes in the cross-examination of the Petitioner, but these objections were overruled and questioning of the Petitioner by the United States Attorney from Exhibits "17" and "18" for identification, which were papers never admitted in evidence, was permitted (R. 867, et seq., 26a, et seq., R. 875, et seq., 33a, et seq.). Although the objection was raised that income tax returns are confidential in nature (R. 867, 27a), the United States Attorney was permitted to continue cross-examining the Petitioner from them over objections of Petitioner's counsel and despite the fact that no proper foundation was established for the use of said documents on this trial.

CHARACTER WITNESSES

Petitioner on the trial presented a number of witnesses who testified as to his reputation for honesty, truth telling and integrity. They all testified that that reputation was good. These witnesses were Judge Wahl, Colonel Paul Akst, David De Voto, a retired policeman, Paul Chang, a Lutheran pastor, Mary Banta a missionary in Chinatown, Leon Michelini a trucking executive, Dr. Francis K. Shepard, a Baptist pastor, and others (73a).

The above outline covers substantially all the testimony introduced at the trial of the Petitioner both by the Government and the appellant.

## Basis of Federal Jurisdiction in the Court of First Instance

The basis of Federal Jurisdiction in the Court of first instance was that the crimes charged were in violation of the Federal Law (18 U. S. C. Sections 371, 2, 1542 and 3238).

## *REASONS RELIED ON FOR THE ALLOWANCE OF THE WRIT OF CERTIORARI*

### POINT I

**Prejudicial error was committed by the Trial Court in permitting the Government to elicit from the witness Samuel B. Waterman testimony that he had invoked the Fifth Amendment at a grand jury hearing as to matters that he testified to at the trial herein.**

This Point is intended to cover questions 1, 2 and 3 presented to this Court for review in Pages 3 and 4 of

this petition. All of the said questions concern the alleged error on the part of the Trial Court in permitting the cross examination of the witness Samuel B. Waterman as to his prior claim of privilege under the Fifth Amendment before the Grand Jury concerning facts that he testified to fully at the trial.

The Court of Appeals at the outset of its opinion, 248 F. 2nd ....., No. 90—October Term, 1957, of the United States Court of Appeals For the Second Circuit, which opinion is annexed hereto as Exhibit "A", characterized the testimony of the witness Waterman, at Page 59, as of a minor nature, to wit, that he testified to a relatively minor facet of the case.

The prosecution, on the contrary, conceded that Waterman's testimony was of great importance to the Petitioner defendant. The Government counsel, in urging the admissibility of the testimony of Waterman in relation to his claim of privilege before the Grand Jury, stated to the Trial Court: "If Your Honor please, the defense has called this witness. They have used him to give testimony to their own interests *and he has given substantial testimony for them, much of which he could not give before the Grand Jury.* I intend to show the contradiction." (Emphasis supplied.) (17a)

It was upon this erroneous primary assumption that the Court of Appeals based its conclusion that no error was committed by the Trial Court in permitting cross examination of the witness Waterman as to his invocation of the Fifth Amendment before the Grand Jury.

With due respect to the Court of Appeals, the Petitioner submits that since the sole issue before the jury was credibility, the witness Waterman was the most im-

portant defense witness in the eyes of the jury,* as the Petitioner who testified in his own defense was obviously an interested witness.

The witness Waterman directly contradicted the testimony of Government witnesses Hom Ing Gim (R. 594, et seq.), Chin Way Mon (R. 605, et seq.), Chin Kung Chee (R. 619, et seq.), and Moy Mun Sing (R. 630, et seq.). It was through the testimony of the aforementioned Government witnesses that the Government based its proof in attempting to prove the guilt of the Petitioner to four counts of a five-count indictment.** It is quite obvious that had the jury believed the testimony of the witness

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* Aside from character witnesses, the sole defense witnesses were Samuel B. Waterman, an attorney (R. 590, 14a) and the Petitioner (R. 709, 23a). The sole issue before the jury was the credibility of the Government witnesses and that of the Petitioner-Defendant.

** The indictment is annexed to this petition as Exhibit "B" hereof. Count 1 of the indictment, the Conspiracy Count, names the Government witnesses Hom Ing Gim (named in indictment as Hom Wing Gim), Chin Kung Chee and Moy Mun Sing as co-conspirators, and their testimony was used also in proof of that Count. The witness Chin Way Mon testified that he had a "paper son", Chin Seu Loon (R. 454) and that he sold the Chin Seu Loon "Slot" to George Wong, who is named in the indictment as a co-conspirator. The witness Chin Way Mon's testimony was used solely in support of Count 1.

Count 3 of the indictment referred to a passport application in the name of Jew Sun Ai as the son of Jew Ing Gim. The witness Hom Ing Gim is also known as Jew Ing Gim and proof of Count 3 of the indictment was based upon the testimony of this witness.

Count 4 of the indictment referred to a passport application in the name of Moy Hing Mee as son of Moy Mun Sing and proof of Count 4 of the indictment was based upon the testimony of the witness Moy Mun Sing.

Count 5 of the indictment refers to a passport application in the name of Sum Nin Gen. The witness Chin Kung Chee is the father of said applicant and proof of this count was based upon the testimony of Chin Kung Chee.

Count 5 is not before the Court on this petition as it was dismissed at the close of the Government's case.

Waterman, it would of necessity had to disbelieve the testimony of the aforementioned Government witnesses with a resultant acquittal on at least three if not all four of the remaining Counts in the indictment.*

The cross-examination of the witness Waterman which elicited the fact that this witness on a prior appearance before a Grand Jury invoked the Fifth Amendment arose in the following manner. On cross-examination, the witness Waterman was asked by the United States Attorney questions regarding fees paid him by clients referred to him by the Petitioner (15a). These questions were fully answered. Then the witness was asked what he did with the fees after he received them. The witness answered that he used said fees and that he deposited some of them in his checking account. On being asked in which bank the checking account was located, he answered that he maintained his checking account in the Trust Company of North America at 115 Broadway. Waterman was then asked if he kept records concerning the payment of the aforementioned fees. He answered in the affirmative, and on being asked the kind of books and records he kept, Waterman stated that he had a checking account wherein his deposits were noted and that he kept a record of his fees with the file of each case (15a-16a). Waterman was then asked whether he thought that his answers to the aforementioned questions would tend to incriminate him, a highly prejudicial question to be asked before a jury. Objection was taken to said question and said objection was sustained.

The United States Attorney, in a discussion taking place out of the hearing of the jury, brought to the attention of the Court that this witness while testifying before the Grand Jury, claimed his privilege under the Fifth Amendment and refused to answer on constitutional

* The jury returned a verdict of guilt as to all four Counts submitted to it at the close of the case.

grounds the aforementioned questions when they were put to him before the Grand Jury and that the government wished to bring this fact out to the jury. The reason for the desire of the United States Attorney to bring this fact to the attention of the jury was submitted by the prosecutor that "I know it is prejudicial. It shows the man's testimony is false" (17a).

THE EXCERPTS OF THAT TESTIMONY ARE AS FOLLOWS:

> "(695) Mr. Goettel: It is a prior statement, contradictory statement before the Grand Jury.
>
> Mr. Stim: It is the most prejudicial thing.
>
> Mr. Goettel: *I know it is prejudicial. It shows the man's testimony is false.* (Emphasis supplied.)
>
> Mr. Stim: And if your Honor will permit it, I will ask for the withdrawal of a juror. It is very unfair.
>
> Mr. Goettel: If your Honor please, the defense has called this witness. *They have used him to give testimony to their own interests and he has given substantial testimony for them, much of which he could not give before the Grand Jury. I intend to show the contradiction.*" (Emphasis supplied.) (17a).

The United States Attorney was then permitted to ask the witness Waterman the following questions:

> Q. And were you asked before the Grand Jury as follows, the following questions:
>
> "'Q. Where would you deposit them? What bank?'"
>
> Were you asked those questions? A. I assume that that I was, if you have it there, in the minutes.

Q. Were you also asked this question:

"'Q. What sort of books and records do you keep?'"

A. I have no recollection whether I was asked that. If you have it here, I will concede that I was asked it.

Q. Do you recall the answers you gave to those questions? A. I do not at this time (19a).

(The following discussion then took place at the (6788) side bar, out of the hearing of the jury.)

Mr. Goettel: I now propose to ask him if he proposed to read the answers to those questions. If not, I will ask him that.

The Court: Do you state that he raised the Fifth Amendment before the Grand Jury?

Mr. Goettel: Yes.

Mr. Stim: Your Honor, is that inconsistent with the statement that he gave here about the deposit in the Trust Company of North America? This is not inconsistent (19a).

The Court: Can't he show that?

Mr. Stim: No.

The Court: That he raised the Fifth Amendment in response to these questions?

Mr. Stim: He cannot, your Honor.

The Court: Why not?

Mr. Stim: That would not be inconsistent. The man refused to answer at one time.

Mr. Goettel: Would this be proper: Would your answers, or your answers to these questions, be incriminatory?

Mr. Stim: No.

Mr. Goettel: If he says no, then I can ask (6789) him.

Mr. Stim: If you ask that question, I will ask for the withdrawal of a juror.

The Court: Can you ask him? Can you ask him, 'Did you raise the question of a Fifth Amendment?'

Mr. Stim: No.

The Court: I cannot possibly see any objection.

Mr. Stim: I cannot stop you, if your Honor will permit it (20a).

(End of discussion at side bar out of the hearing of the jury.)

BEFORE THE JURY:

Q. "'Where would you deposit them.'"

'Q. "What bank?', and then,"

'Q. "What sort of books and record do you keep?'" When you were asked those questions, did you reply that any answer might incriminate you?

Mr. Stim: Just one moment.

The Court: Why not do as I suggested? (20a).

Mr. Goettel: I thought I was.

The Court: I will rule on the question, but will you do as I asked, as I suggested it be asked. Did you say so and so before the Grand Jury?

Q. Did you claim your rights under the Fifth Amendment before the Grand Jury in answer to those questions?

(700) Mr. Stim: Your Honor, at this time I move for the withdrawal——

The Court: You make an objection?

Mr. Stim: I object to that question.

The Court: Overruled.

Mr. Stim: And I ask for the withdrawal of a juror.

The Court: Overruled, denied.

Mr. Stim: Exception.

A. I am sorry?

Mr. Goettel: Will you please read the question?

(Pending question read.)

A. If it is stated there that I did, I did.

Q. Yes or no. A. If it is stated there that I did—

Mr. Stim: Will your Honor state that every citizen——

Mr. Goettel: Your Honor——

Mr. Stim: Just one minute, you made a speech.

The Court: Address the Court.

Mr. Stim: I respectfully ask the Court to instruct the jury that every citizen has a right under the Constitution of the United States—(21a).

Mr. Goettel: I want these speeches before (701) your Honor and not for the jury.

The Court: He has a right to make this choice.

Mr. Stim: He has a right to make that choice and invoke his constitutional right, and that is not to be inferred as any evidence of guilt on the part of the defendant.

Mr. Goettel: Your Honor, I object to these continual statements on the part of the counsel in front of the jury.

The Court: There is no necessity for that at this time except to say that the raising of that issue, if it is raised by this counsel, or this witness, is not in any way to reflect upon the defendant.

Mr. Goettel: What was the last question and answer?

Mr. Stim: Your Honor, how many times must we have this question and answer?

The Court: Just wait a minute, Mr. Stim. Read the question.

(Pending question read.)

Q. I want a yes or no answer, whether to the best of your recollection you claimed the Fifth Amendment when you were asked those questions.

Mr. Stim: May I have the same objection, (702) your Honor.

A. I do not recall whether I did or not.

Q. Do you recall making these answers to these questions:

'Q. What bank? A. I refuse to answer, Mr. Goettel' (22a).

"'Q. On what grounds? A. On the grounds that it may incriminate me.'"

Mr. Stim: Your Honor, I have an objection to all that line.

The Court: Yes, your objection has been noted and your objection has been overruled.

Q. Do you recall making those answers at that time? A. I don't recall it, but if it is down in the minutes there, then I made it.

Q. Do you recall making this answer to this question:

'Q. "What sort of books and records do you keep? A. I refuse to answer on the ground it may incriminate me.

A. I don't recall it but the same thing, if it is down there, then I made it" (23a).

These questions and answers propounded to and given by the witness Waterman before the Grand Jury, were permitted by the Trial Court to be asked at the trial for the purpose of having the Trial Jury become aware that the witness invoked before the Grand Jury his constitutional right under the Fifth Amendment, because "there was a case that went up from this Court where the use of it was sustained" (17a), apparently relying on the decision of this Court in *Grunewald* v. *United States*, 233 F. 2d 556, since reversed by this Court (353 U. S. 391, 1 L. ed. 2d 931, 77 S. Ct.—Nos. 183, 184 and 186, argued April 3 and 4, 1957, decided May 27, 1957).

Up to the time that the aforementioned series of questions were permitted on cross-examination, it must be conceded (as the prosecutor did) (17a), that the witness Waterman was a very strong witness for the defense. After the Government had been permitted to ask a series of questions relating to the witness' claim of privilege before the Grand Jury on the grounds of possible self-incrimination, the credibility of this witness was completely destroyed.

The trial in this case took place during the month of February 1957 which was prior to the decision of the *Grunewald* case by this Court.

In the *Grunewald* case the conviction of the co-defendant Halperin as to counts 5, 6 and 7 was reversed for error committed at the trial similar to the error claimed here. In the *Grunewald* case, Halperin, the witness who took the stand, was a co-defendant, while in the present case the witness Samuel B. Waterman was not. In *Grunewald*, the Court permitted the co-defendant, Halperin, to be cross-

examined as to the fact that he had claimed, as did Waterman, his constitutional privilege against self-incrimination before the Grand Jury concerning certain questions that he had voluntarily testified to at the trial. The issue was defined by this Court on page 418 as follows:

> "It is, of course, an elementary rule of evidence that prior statements may be used to impeach the credibility of a criminal defendant *or an ordinary witness*. But this can be done only if the judge is satisfied that the prior statements are in fact inconsistent. 3 Wigmore, Evidence, §1040. And so the threshold question here is simply whether, in the circumstances of this case, the trial court erred in holding that Halperin's plea of the Fifth Amendment privileges before the grand jury involved such inconsistency with any of his trial testimony as to permit its use against him for impeachment purposes." (Emphasis supplied.)

This Court thereon went on to state at page 423:

> "We are not unmindful that the question whether a prior statement is sufficient inconsistent to be allowed to go to the jury on the question of credibility is usually within the discretion of the trial judge. But where such evidentiary matter has grave constitutional overtones, as it does here, we feel justified in exercising this Court's supervisory control to pass on such a question. This is particularly so because in this case the dangers of impermissible use of this evidence far outweighed whatever advantage the Government might have derived from it if properly used. If the jury here followed the judge's instructions, namely, that the plea of the Fifth Amendment was relevant only to credibility, then the weight to be given this evidence

was less than negligible, since, as we have outlined above, there was no true inconsistency involved; it could therefore hardly have affected the Government's case seriously to exclude the matter completely. On the other hand, the danger that the jury made impermissible use of the testimony by implicitly equating the plea of the Fifth Amendment with guilt is, in light of contemporary history, far from negligible. Weighing these factors, therefore, we feel that we should draw upon our supervisory power over the administration of federal criminal justice in order to rule on the matter. Cf. McNabb v. United States, 318 U. S. 332, 87 L. ed. 819, 63 S. Ct. 608.

We hold that under the circumstances of this case it was prejudicial error for the trial judge to permit cross-examination of petitioner on his plea of the Fifth Amendment privilege before the grand jury, and that Halperin must therefore be given a new trial on Counts 5, 6 and 7. * * * "

A recent decision of the United States Court of Appeals for the Tenth Circuit which follows the *Grunewald* decision of this Court and which is apparently in conflict with the opinion of the United States Court of Appeals for the Second Circuit in the instant case is *Travis v. United States*, 247 F. 2d 130. In that case a character witness for the defendant was asked by the Government on cross-examination whether or not he had heard that when the defendant Travis appeared before a U. S. Senate Committee and was asked if he was at that time a member of the Communist party, that he had refused to answer on the ground that it would incriminate him. Before overruling objection to the question, the Trial Court, as it did in the instant case, made inquiry as to the factual background of the assumption contained in the question. When it was determined that that did occur, the

Trial Court overruled the objection and permitted the question. On appeal this error was urged as requiring reversal. In reversing the conviction and remanding for a new trial the Court of Appeals for the Tenth Circuit said *inter alia*:

> "* * * One who claims the rights and privileges of the Constitution most certainly does not exhibit a character defect of any kind and, if one who lawfully asserts the shelter of the Fifth Amendment becomes, in so doing, a person of guilt or a perjurer in the minds of some, the shame lies with those who misunderstand and not with him who is entitled to protection. Cross examination probing the witnesses' knowledge of Travis's claim of constitutional immunity during the McCarren hearing had, we believe, no proper probative value but if such existed it was, as stated by Mr. Justice Harlan in Grunewald v. United States (decided May 27, 1957), 'far outweighed by its impermissble impact upon the jury,' had 'grave constitutional overtones,' and was fraught with 'the danger that the jury made impermissible use of the testimony by implicitly equating the plea of the Fifth Amendment with guilt * * *.' The admission of this evidence necessitates a new trial. Grunewald v. United States, supra; Curcio v. United States (decided June 10, 1957."

The United States Attorney was or should have been well aware that at the time when this testimony was elicited, the decision of the Court of Appeals for the Second Circuit in *Grunewald* (233 F. 2d 556) upholding the Halperin conviction, was being appealed to this Court and that that appeal was then pending. The Trial Court permitted this testimony relying on the decision of the United States Court of Appeals for the Second Circuit in *Grunewald, supra* (17a). The Government gambled on the chance that

this Court would sustain the conviction notwithstanding the claimed error. Having gambled and lost, the Government can blame no one but itself for the reversible error committed in the instant case.

The Court of Appeals in its opinion in an attempt to buttress its decision urges that the Petitioner on the direct examination of Waterman opened the door to cross-examination of the witness Waterman as to his invocation of the Fifth Amendment before the Grand Jury. It was the Court of Appeals which for the first time raised this contention. This point was neither raised at the trial nor in the Government's brief or on the argument of the appeal, nor was that testimony admitted on such grounds. (See Pages 39 to 45 of this Petition.)

The United States Court of Appeals for the Second Circuit in a recent case reversed a conviction, basing as one of the grounds of its reversal on the fact that the Government on cross-examination elicited the fact that a defense witness invoked the Fifth Amendment before a Grand Jury. See *United States* v. *Tomaiolo*, 248 Fed. 2d . . . No. 24509, 2nd Circuit, Filed November 21, 1957. In that case, the Second Circuit cited the decision in *Grunewald*, but went on to state in effect that it was not bound by *Grunewald*, as the Court of Appeals' opinion on reversal states that each of the errors claimed on appeal in and of themselves alone would not have warranted reversal, the reversal being based on the aggregate of errors.

Certainly on this point alone certiorari should be granted.

## POINT II

**The Government used improperly obtained matter to use in cross-examination of the Petitioner, in violation of his rights under the federal laws.**

On the cross examination of the Petitioner, he was questioned from tax returns filed by him for the years 1951 and 1952. These returns were marked as Exhibits 17 and 18, respectively, for identification (26a, 33a). While the returns themselves were not admitted in evidence, the Petitioner was cross examined extensively from same so that the jury was apprised of the contents of said tax returns from the nature of the questions propounded and the answers to same. Timely objection was taken by Petitioner's counsel to this line of questioning (27a) but said objection was overruled by the Court.

While it is admitted that tax returns may be used in a proper case, it is respectfully submitted that they were improperly used on the trial herein and that by using said returns for cross examination purposes, the Government made use of illegally obtained evidence, and the conviction based upon the use of said evidence illegally obtained should be reversed.

Section 55 of Title 26 United States Code provides that tax returns "shall be open to inspection only upon order of the President and under rules and regulations prescribed by the Secretary and approved by the President".

Although objection was immediately taken to the use of any tax returns, there was no offer on the part of the Government or order by the Court requiring the Government to show authorization from the President or from the Com-

missioner of Internal Revenue authorizing use of these papers for the particular purposes of this trial by the Government.

The Federal Tax Regulations (1954) Section 458.1 *et seq.* outline an elaborate procedure regarding inspection of returns. Section 458.5 applies to returns of individuals and Section 458.6 applies to joint returns of husband and wife. In neither of these Sections is there provision for unrestricted disclosure of the contents of tax returns.

Section 458.33, which provides for inspection of tax returns by branches of the government other than Treasury Department, contains an elaborate procedure before tax returns or copies of same can be released to other governmental departments for use by same, while Section 458.34 provides for inspection of returns by the Government attorneys. Section 458.204 of the Federal Tax Regulations (Printed in full on p. 8 of this Petition) contains a specific limitation on the use of tax returns obtained by the Attorney General. This Section provides "* * * *if a return or copy is thus furnished, it shall be limited in use to the purpose for which it is furnished and is under no condition to be made public except to the extent that publicity necessarily results from such use.* * * *"*

Nowhere in the record of this trial was compliance with the statutory provisions or with the Federal Tax Regulations shown.

The Federal Tax Regulations are the creatures of statute and may not enlarge the powers granted the Commissioner pursuant to the terms of the statute. Certainly in the absence of a showing by the Government at the trial of compliance with the terms of the statute or the Regulations, use of the returns in any capacity should have been forbidden. The argument of the Court of Appeals that the Government was "never asked to produce such an-

thorization at trial" (Page 143 of opinion) disregards the conceded fact that the defendant made a timely objection (27a) to the questioning from the income tax returns; thus placing upon the Government the burden of proving authorization to use these returns for cross examination.

The trial Court committed reversible error in permitting over objection the use of the Petitioner's tax returns for the purposes of cross-examination of the Appellant during the trial herein.

## CONCLUSION

**The petition for certiorari should be granted and this Court in the exercise of its powers should order the judgment of conviction herein reversed and the matter remanded to the appropriate Court to be dealt with accordingly.**

Respectfully submitted,

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## Exhibit A

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 90—October Term, 1957.

(Argued October 10, 1957 Decided December 6, 1957.)

Docket No. 24624

UNITED STATES OF AMERICA,

*Appellee,*

—v.—

SING KEE,

*Appellant.*

Before:

CLARK, *Chief Judge,*
LUMBARD and MOORE, *Circuit Judges.*

Defendant was convicted in the District Court for the Southern District of New York, Richard H. Levet, *J.*, presiding, for conspiracy to violate the Immigration Laws, 18 U. S. C. A. § 371, 1425 and 1542, and 8 U. S. C. A. 1342, and on three other counts for making false statements in passport applications, in violation of 18 U. S. C. A. 1542 and 3238. There being no error in the government's cross-examining defense witness Waterman to disclose that he had pleaded the Fifth Amendment to avoid answering certain questions before the grand jury, the conviction is affirmed.

GERARD L. GOETTEL and ARTHUR B. KRAMER, Assistant United States Attorneys, Southern District of New York, New York, N. Y. (Paul W. Williams, United States Attorney, Southern District of New York, on the brief), *for appellee*.

MENAHEM STIM, New York, N. Y. (Allen S. Stim, Norman L. Kee and Curran, Mahoney, Cohn & Stim, New York, N. Y., on the brief), *for appellant*.

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LUMBARD, Circuit Judge:

This appeal turns on whether it was error for the government to cross-examine defendant's witness Samuel Waterman to disclose that he had asserted the shield of the Fifth Amendment to avoid answering certain questions put to him before the grand jury. We hold that in the setting of this case the cross-examination was proper and accordingly we affirm the conviction.

Sing Kee appeals from a judgment of conviction and sentence entered on March 5, 1957, after a jury, presided over by Judge Richard H. Levet in the Southern District of New York during a ten day trial, found him guilty on four counts. Count 1 charged that the defendant, from 1949 until indictment in May 1956, conspired with certain named and unnamed persons to violate the Immigration Laws of the United States, 18 U. S. C. A. §§371, 1425 and 1542, and 8 U. S. C. A. §1342. The other three counts charged that Sing Kee on three separate occasions, in 1951 and 1952, wilfully and knowingly made false statements in applications for passports with intent to induce and secure the issuance of passports for the use of others by stating, when he knew it to be untrue, that the applicants were

the sons of named persons, 18 U. S. C. A. §§2, 1542 and 3238. A fifth count, which also charged a false statement in a passport application, was dismissed at the close of the government's case. The defendant was sentenced to 2½ years and fined $1,500 on each count, the prison sentences to run concurrently.

The government's proof to sustain the conviction was abundant and convincing. In summary, the evidence disclosed that Sing Kee, while operating the China Overseas Travel Service at 11 Mott Street in New York's Chinatown, was also engaged in preparing and processing passport applications for Chinese attempting to gain entry into this country by posing as sons of Chinese-American citizens. The Chinese immigration quota of 100 each year, 8 U. S. C. A. 1151, virtually limited immigration from China to those who were derivative citizens by virtue of the American citizenship of one of their parents.

The scheme was, in general, as follows: Chinese American citizens or alleged citizens, married in China while on visits to that country or before original entry into the United States, would make fictitious reports to the immigration authorities of sons born to them in China or would fail to report the deaths of sons who had resided in China. Immigration records would accordingly list a citizen son not actually in existence. The "slot" thus created would be sold by the "parent" for prices usually ranging from $1,000 to $1,800 to a Chinese in the United States who desired to bring over a youth comparable in age to the fictitious son. Sing Kee would prepare or would have prepared the necessary passport applications and supporting affidavits and would produce doctoring books called "chalzoons," from which the applicant, in Hong Kong, could obtain the necessary basic facts concerning the family of which he claimed to be a son. This information was necessary to substantiate the claim of derivative citizenship

and thus enable the applicant to come to the United States as a citizen. Sing Kee usually received for his services from $400 to $600, part of which he paid to attorneys and others. In six separate cases there was evidence that Sing Kee was well aware that the "sons" were not sons. In one case it was testified that Sing Kee himself arranged to buy a slot from a father.

Several persons were involved, wittingly or unwittingly, in the transactions giving rise to the prosecution. A physician and a serologist, Doctors Liu and Sussman, determined the compatability of the blood of the alleged sons with that of their supposed parents so as to weed out the incompatibles. A brother of the defendant, Albert Kee, a friend, Wilbur Chung, and a notary public, Louis Treglia, all performed services incidental to the conspiracy. In addition, one attorney prepared affidavits, usually for $25, and another followed the course of these matters through the State Department for fees of from $25 to $75, and both attorneys transmitted the affidavits and passport applications to the appropriate authorities.

In those cases where the State Department refused to issue passports to the spurious sons, Sing Kee referred the "parents" to Samuel Waterman, an attorney who had offices at 111 Broadway in lower Manhattan. Waterman filed suits in the federal courts under §503, Nationality Act of 1940, 54 Stat. 1171, on behalf of the "parents" for declaratory judgments that their "sons" were citizens. Between mid-1951 and December 24, 1952, the date after which such suits could no longer be brought by reason of the provisions of the Immigration and Nationality Act of 1952, 66 Stat. 281 and 8 U. S. C. A. §1503, 66 Stat. 273, Waterman filed between 50 and 75 such cases referred to him by Sing Kee. Among these were suits in which Hom Wing Gim, Moy Mun Sing and Chin Kung Chee were plaintiffs. Hom Wing Gim and Moy Mun Sing testified that they had sold

"sons" and thereafter had made arrangements with Sing Kee in such wise that the jury could well conclude that Sing Kee knew that the passport applications which he caused to be filed in Hong Kong and the civil complaints were fraudulent and false. In the case of Chin Kung Chee the jury could well conclude that Sing Kee knew the complaint to be spurious. On cross-examination all three "fathers" were asked whether they had met and talked with their attorney Waterman. Each of them testified that they had not talked with Waterman but that they had gone to his office, had signed papers, and had dealt with persons other than Waterman.

*The Defense*

Sing Kee testified on his own behalf and conceded that he had assisted in bringing in many sons and attempted to bring in others. He denied knowledge of the fraudulent nature of any of the claims and that he had prepared any halfgoons. He claimed that he had received only small sums for expenses, although he admitted that he had netted $23,000 in 1951 and 1952 after expenses.

Apart from character witnesses, Waterman was the only other defense witness. He testified that the information upon which he had brought the suits involving derivative citizenship claims of Chinese was given him by the fathers, that he had no knowledge of any fraudulent claim and that he had no reason to believe that Sing Kee had any such knowledge.

Waterman swore that he had met and talked with Hom Wing Gim, Moy Mun Sing and Chin Kung Chee prior to filing complaints on their behalf.[1] In this respect his testimony conflicted with theirs as they had denied meeting him.

[1] In his testimony before the grand jury Waterman was not sure whether he had discussed their cases with Hom Wing Gim, Moy Mun

Waterman testified on cross-examination that the fees he received through Sing Kee were deposited in his checking account in the Trust Company of North America at 115 Broadway and that he kept records of these fees on his check stubs and in the individual case files. The government was then permitted to bring out, over defense objection, that in his testimony before the grand jury Waterman had claimed his Fifth Amendment privilege not to answer questions regarding his fees and records on the ground that the answers might tend to incriminate him.[2]

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Sing and Chin Kung Chee. At the trial he testified that he had refreshed his recollection after his grand jury appearance and he remembered going over the details with them before drawing up the complaints.

[2] The following appears in the trial minutes:

"Q. Mr. Waterman, were you asked the following questions before the Grand Jury * * *

'Q. When you received these various payments, what did you do with them?'

And the next question was * * *

* * * * *

Q. And were you asked before the Grand Jury as follows, the following questions:

'Q. Where would you deposit them? What Bank?'

Were you asked those questions? A. I assume that I was, if you have it there, in the minutes.

Q. Were you also asked this question:

'Q. What sort of books and records do you keep?'

A. I have no recollection whether I was asked that. If you have it there, I will concede that I was asked it.

Q. Do you recall the answers you gave to those questions? A. I do not at this time.

* * * * *

Q. 'Where would you deposit them? Q. What bank?', and then, 'Q. What sort of books and records do you keep?' When you were asked those questions, did you reply that any answer might incriminate you?

* * * * *

Q. Did you claim your rights under the Fifth Amendment before the Grand Jury in answer to those questions?

* * * * *

A. If it is stated there that I did, I did.

* * * * *

(138)

We hold that in the setting of this case, and considering especially the entire examination of Waterman and the weight and significance of his testimony, the relevance of Waterman's grand jury claim of privilege outweighed the danger that the jury would draw from it any impermissible inference regarding Sing Kee's guilt of the charges for which he was on trial.

Waterman testified to a relatively minor facet of the case, namely, whether he had or had not talked with the "fathers" before filing suit for them. If on this point the jury disbelieved the three "fathers" that, of course, would cast suspicion on their credibility as to the more important testimony concerning Sing Kee's guilty knowledge that the "sons" were spurious. Waterman's testimony did not go to the heart of the case; it merely contradicted three witnesses on a minor matter which at best could only raise a question as to their credibility.

Defendant asks us to reverse the convictions on the authority of *Gruenwald* v. *United States*, 353 U. S. 391 (1957). We do not agree that *Gruenwald* requires reversal under the circumstances of this case. *Gruenwald* requires

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Q. I want a yes or no answer, whether to the best of your recollection you claimed the Fifth Amendment when you were asked those questions.

* * * * *

A. I do not recall whether I did or not.

Q. Do you recall making these answers to these questions:

"Q. What bank? A. I refuse to answer, Mr. Goettel.

"Q. On what grounds? A. On the grounds that it may incriminate me.'

* * * * * *

Q. Do you recall making those answers at that time? A. I don't recall it, but if it is down in the minutes there, then I made it.

Q. Do you recall making this answer to the question:

"Q. What sort of books and records do you keep? A. I refuse to answer on the grounds that it may incriminate me. A. I don't recall it but the same thing, if it is down there, then I made it."

an *ad hoc* determination by the trial judge, wherein he must balance two competing considerations in the light of all the circumstances of the case—the extent to which the prior claim of privilege affects the credibility of the witness and the possible impermissible impact on the jury occasioned by a showing of the prior plea. The trial judge did not abuse his discretion by permitting the cross-examination of Waterman.

As in *Gruenwald*, the answers given by Waterman on cross-examination at trial were not necessarily inconsistent with the claim of the privilege before the grand jury. Although by themselves his answers to the specific questions did not tend to connect him with Sing Kee, neither were they exculpatory. Indeed, exculpatory testimony is not necessarily inconsistent with a prior plea of the Fifth Amendment. See *United States* v. *Tomaiolo*, No. 24509, 2 Cir., filed November 21, 1957.

Here, however, there was an inconsistency between Waterman's answers before the grand jury and the inference raised by his testimony at trial regarding his conduct before the grand jury. Defense counsel questioned Waterman on direct examination about his appearance before the grand jury, as follows:

> "Q. By the way, Mr. Waterman, were you a witness before the Grand Jury? A. I was, sir.
>
> Q. And did you give the Grand Jury the same testimony that you are giving us here; substantially? A. Well, if I was asked the same questions.
>
> Q. Was the testimony true that you gave to the Grand Jury? A. As far as I know, yes, sir.
>
> Q. What I mean is, was it true, as far as you knew? A. That's right.
>
> Q. And you had your files with you? A. I think I did."

The answers given by the witness were factually accurate, but they were capable of a much broader interpretation. The defendant would have had the jury believe that Waterman had been a cooperative and candid witness before the grand jury, thereby bolstering his credibility. Having brought the conduct of the witness before the grand jury into issue, the defendant cannot now complain that the government was permitted to develop all that happened so as to rebut an inference which was contrary to fact. The rule enunciated in *Grunewald* was intended to implement the constitutional guarantee against self-incrimination; it was not intended to permit a defendant to draw out part of the facts from a witness while foreclosing the government on cross-examination from developing all the facts so that the partial account is not misleading. Cf. *Walder* v. *United States*, 347 U. S. 62 (1954).

But to hold that the plea of the Fifth Amendment was inconsistent with the inference raised by the witness' testimony on direct examination and hence was material in impeaching his credibility is but half the answer. We must go on to consider the possible impermissible impact on the jury.

Here the crucial question is whether the jury would be likely to equate Waterman's refusal to answer these few questions before the grand jury with the defendant's guilt. If the danger that the jury's knowledge of the prior plea might have been improperly carried over so as to affect its belief in the defendant's innocence or guilt outweighed the effect on credibility, then evidence of the prior plea should have been excluded. See *Travis* v. *United States*, 247 F. 2d 130 (10 Cir. 1957).

We do not believe that, in the circumstances of the case, the dangers of an impermissible impact on the jury were such as to override the consideration justifying admission. Unlike *Grunewald*, the witness in this case was not a de-

fendant. Since Waterman did not file the civil actions until the passport applications had been administratively denied, his contact with the defendant as to each transaction occurred subsequent to the filing of the fraudulent application. Because his involvement in Sing Kee's activities was merely peripheral, Waterman's testimony was directed to and conflicted with prosecution testimony only regarding his procedure in filing civil actions. The danger that the jury would believe Sing Kee to be guilty because of his association with Waterman, who had pleaded the Fifth Amendment, was minimal. As it was, the trial judge immediately instructed the jury that the raising of this issue was "not in any way to reflect upon the defendant."[3] There was not the kind of intimate relationship between Waterman and Sing Kee which might cause the jury to consider the actions of one the actions of the other. See *United States* v. *Tomaiolo*, *supra*, where the witness who pleaded the Fifth Amendment was the defendant's brother.

The thrust of the questions which Waterman had previously refused to answer was even more remote from the heart of the case than Waterman's contradictions of the testimony of the three prosecution witnesses. Unlike *United States* v. *Tomaiolo*, *supra*, the questions were not so intimately related to the details of the crime that a jury, coupling the answers at trial with the prior plea, would be likely improperly to infer facts directly bearing on defendant's participation in the crimes charged. Even if the jury had equated Waterman's prior plea with his guilt of a criminal act, it does not follow that it would go on to infer that the criminal acts involved Sing Kee. Much evi-

[3] The defendant requested no further charge to the jury on this point and none was given. Under these circumstances it was not required that the judge instruct the jury again in the charge, but it seems to us that such a charge would have been desirable to make sure that the jury clearly understood the limited purpose of the fact that a witness had previously pleaded the Fifth Amendment to certain questions.

dence was introduced to establish what Sing Kee was paid and the moneys he disbursed in handling passport matters and most of this was not disputed.

The questions which Waterman refused to answer related to his handling of his personal funds after receipt from the defendant, an inquiry without direct bearing on Sing Kee's knowledge of the spurious nature of the claims, and Waterman had freely testified to his relationship with Sing Kee. The possible reasons for Waterman refusing to divulge facts regarding his handling of his personal finances were so varied[4] that, in our opinion, there was not a substantial likelihood, under all the circumstances here attendant, that the jury would indulge in speculations which would result in their equating the witness' refusal to testify with the defendant's guilt.

Sing Kee complains of two other matters as constituting error, both of which we find without merit. On his cross-examination he was questioned from tax returns submitted by him for the years 1951 and 1952, the returns being used to refresh his recollection. At that time appellant's counsel objected to the use of the returns on the ground that they could be used only in an income tax case. This objection was properly overruled. *Lewy* v. *United States*, 29 F. 2d 462 (7 Cir. 1928), *cert. den.* 279 U. S. 850; *United States* v. *Rollnick*, 91 F. 2d 911, 918 (2 Cir. 1937). It is now urged that the government failed to show that the returns had been obtained in accordance with 26 U. S. C. A. §6103(a) and 26 CFR 601.702 (1956), 26 CFR 458.204 (1939). The government was never asked to produce such authorization at trial, but the government asserts that it was prepared

[4] If the jury were improperly to draw any inferences of guilt from Waterman's plea of privilege it seems more likely that they would infer that Waterman feared investigation with respect to income taxes, failure to report payments of money to others, or the like, all matters quite foreign to the charges against Sing Kee and Sing Kee's possible guilt.

to do so if the point had been raised. When the trial judge correctly overrules a specific objection, it cannot be argued on appeal that the evidence, or, as here, the use of returns to refresh recollection, was improper for a different reason. *Norwood* v. *Great American Indemnity Co.*, 146 F. 2d 797 (3 Cir. 1944). Such an afterthought deserves no attention, especially where it is apparent that the government could have satisfied the court as to the ground now belatedly urged.

Appellant also charges that there was a variance between the indictment and proof, since the evidence disclosed six separate conspiracies rather than one. Even if we assume that such a variance exists, it is not fatal to the conviction as it did not affect the substantial rights of the accused. *Berger* v. *United States*, 295 U. S. 78, 82 (1935). This is not a situation where a defendant involved in one conspiracy has been convicted in a mass trial encompassing numerous other conspiracies involving matters and persons entirely unknown to him; nor are there any questions relating to the admission of statements by alleged co-conspirators as in *Kotteakos* v. *United States*, 328 U. S. 750 (1946). Here Sing Kee was the only defendant; he was the key figure in all that transpired. Since the principal government witnesses are named in the conspiracy count and since four of the transactions served as bases for the other counts, it is evident that the defense was not taken by surprise by the evidence at trial. Nor is there any danger of another prosecution for the same offense. See *Berger* v. *United States*, *supra*. Thus there is no merit to Sing Kee's claim of error on the ground that the proof showed numerous conspiracies rather than one. *Monroe* v. *United States*, 234 F. 2d 49 (D. C. Cir. 1956); *Quirk* v. *United States*, 161 F. 2d 138 (8 Cir. 1947).

The judgment is affirmed.

## Exhibit B

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

INDICTMENT

C 150-98

14486

—o—

[SAME TITLE]

—o—

The Grand Jury charges:

1. Beginning in and about 1949 and continuously thereafter up to and including the date of the filing of this indictment, at the Southern District of New York, Sing Kee, the defendant herein, did unlawfully, wilfully and knowingly combine, conspire, confederate and agree with Ng Chee Hung, Ng Sim Yee, Ng Mong On, Hom Wing Gim (also known as Jew Ing Gim), Ng Yee Chor (also known as Ng Quock Keung), Ng Jock Neuy (also known as Jew Sun Ai), Moy Mun Sing, Chin Kung Chee (also known as Sum Yuen Quay), and George Wong, named as co-conspirators but not defendants herein, and with divers other persons to the Grand Jurors unknown, to defraud the United States and to commit offenses against the United States, it wit, to violate Title 18, Sections 1425 and 1542 and Title 8, Section 1324 of the United States Code.

2. It was part of said conspiracy that the defendant and other co-conspirators would wilfully and knowingly

encourage and induce the entry into the United States of aliens not lawfully entitled to enter or reside under the laws relating to the immigration of aliens.

3. It was further part of said conspiracy that the defendant and other co-conspirators would make false statements and cause false statements to be made in applications for passports in the names of Moy Hing Mee, Sum Nin Oon, Ng Quock Keung and Jew Sun Ai, with intent to induce and secure the issuance of passports under the authority of the United States for the use of others, contrary to the laws regulating the issuance of passports (Section 211a et seq., Title 22, United States Code), and the rules prescribed pursuant to such laws (Section 42.101 et seq., Title 22, Code of Federal Regulations).

4. It was further part of said conspiracy that the defendant and other co-conspirators would prepare false and fraudulent affidavits in support of said applications in the names of Moy Hing Mee, Sum Nin Oon, Ng Quock Keung and Jew Sun Ai.

5. It was further part of said conspiracy that the defendant and other co-conspirators would submit and file, and cause to be submitted and filed, the aforesaid applications with the Consul of the United States of America in and for the Consular District of Hong Kong in the British Crown Colony of Hong Kong.

6. It was further part of said conspiracy that the defendant and the other co-conspirators would knowingly attempt to procure and obtain documentary evidence of citizenship for other persons not entitled thereto, by causing civil actions to be instituted and filed under Section 503 of the Nationality Act of 1940, in the names of Jew Sun

Ai, Moy Hing Mee, Chin Xin Oon and Chin Seu Toon, to have them declared citizens of the United States.

OVERT ACTS

The Grand Jury further charges that in furtherance of the said conspiracy and to effect the objects thereof the defendant and other co-conspirators performed the following overt acts:

1. In or about 1949, in the Southern District of New York, the defendant Sing Kee had a conversation with Hom Wing Gim at 11 Mott Street, New York, N. Y.

2. In or about December, 1949, in the Southern District of New York, the defendant Sing Kee was paid $400. by Eng Gim Ting at 11 Mott Street, New York, N. Y.

3. On or about December 21, 1949, in the Southern District of New York, the defendant Sing Kee handed Hom Wing Gim an unsigned affidavit at 11 Mott Street, New York, N. Y.

4. In or about March, 1950, in the Southern District of New York, the defendant Sing Kee had a conversation with Ng Mong On at 11 Mott Street, New York, N. Y.

5. On or about the 24th day of March, 1950, in the Southern District of New York, the defendant Sing Kee handed Ng Mong On an unsigned affidavit at 11 Mott Street, New York, N. Y.

6. In or about April, 1952, in the Southern District of New York, the defendant Sing Kee had a conversation with Chin Kung Chee at 11 Mott Street, New York, N. Y.

7. On or about the 5th day of May, 1952, in the Southern District of New York, the defendant Sing Kee handed Chin Kung Chee an unsigned affidavit at 11 Mott Street, New York, N. Y.

8. In or about September, 1952, in the Southern District of New York, the defendant Sing Kee had a conversation with Moy Mun Sing at 11 Mott Street, New York, N. Y.

9. On or about the 6th day of October, 1952, in the Southern District of New York, the defendant Sing Kee handed Moy Mun Sing an unsigned affidavit at 11 Mott Street, New York, N. Y.

10. In or about December, 1952, in the Southern District of New York, the defendant Sing Kee had a conversation with George Wong at 11 Mott Street, New York, N. Y. (Title 18, Section 371, United States Code.)

COUNT TWO

The Grand Jury further charges:

On or about January 18, 1951, at the British Crown Colony of Hong Kong, Sing Kee, the defendant herein, who is found in the Southern District of New York, did wilfully and knowingly make a false statement in an application for passport in the name of Ng Quock Keung, with intent to induce and secure the issuance of a passport under the authority of the United States for the use of another, contrary to the laws regulating the issuance of passports (Section 211a et seq., Title 22, United States Code), and the rules prescribed pursuant to such laws (Section 42.101 et seq., Title 22, Code of Federal Regu-

lations), by submitting an affidavit to the Consul of the United States of America in and for the consular district of Hong Kong in support of said application stating that the passport applicant was the son of Ng Mong On, when in truth and in fact, as the defendant then well knew, the passport applicant was not the son of Ng Mong On. (Title 18, Sections 2, 1542 and 3238, United States Code.)

COUNT THREE

The Grand Jury further charges:

On or about June 18, 195', at the British Crown Colony of Hong Kong, Sing Kee, the defendant herein, who is found in the Southern District of New York, did wilfully and knowingly make a false statement in an application for passport in the name of Jew Sun Ai, with intent to induce and secure the issuance of a passport under the authority of the United States for the use of another, contrary to the laws regulating the issuance of passports (Section 211a et seq., Title 22, United States Code), and the rules prescribed pursuant to such laws (Section 42.101 et seq., Title 22, Code of Federal Regulations), by submitting an affidavit to the Consul of the United States of America in and for the consular district of Hong Kong in support of said application stating that the passport applicant was the son of Jew Ing Gim, when in truth and in fact, as the defendant then well knew, the passport applicant was not the son of Jew Ing Gim. (Title 18, Sections 2, 1542 and 3238, United States Code.)

COUNT FOUR

The Grand Jury further charges:

On or about October 28, 1952, at the British Crown Colony of Hong Kong, Sing Kee, the defendant herein, who is found in the Southern District of New York, did wilfully and knowingly make a false statement in an application for passport in the name of Moy Hing Mee, with intent to induce and secure the issuance of a passport under the authority of the United States for the use of another, contrary to the laws regulating the issuance of pasports (Section 211a et seq., Title 22, United States Code), and the rules prescribed pursuant to such laws (Section 42.101 et seq., Title 22, Code of Federal Regulations), by submitting an affidavit to the Consul of the United States of America in and for the consular district of Hong Kong in support of said application stating that the passport applicant was the son of Moy Mun Sing, when in truth and in fact, as the defendant well knew, the passport applicant was not the son of Moy Mun Sing. (Title 18, Sections 2, 1542 and 3238, United States Code.)

COUNT FIVE

The Grand Jury further charges:

On or about December 10, 1952, at the British Crown Colony of Hong Kong, Sing Kee, the defendant herein, who is found in the Southern District of New York, did wilfully and knowingly make a false statement in an application for passport in the name of Sum Nin Oon, with intent to induce and secure the issuance of the passport under the authority of the United States for the use of another, contrary to the laws regulating the issuance of

passports (Section 211a et seq., Title 22, United States Code), and the rules prescribed pursuant to such laws (Section 42.101 et seq., Title 22, Code of Federal Regulations), by submitting an affidavit to the Consul of the United States of America in and for the consular district of Hong Kong in support of said application stating that the passport applicant and his father were members of the Sum family, when in truth and in fact, as the defendant then well knew, the passport applicant and his father were not members of the Sum family. (Title 18, Sections 2, 1542 and 3238, United States Code.)

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Foreman

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PAUL W. WILLIAMS
United States Attorney